

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of FRANCES CHIPCHASE, Deceased.

JERRY W. CHIPCHASE,

Petitioner-Appellant,

v

DON R. CHIPCHASE, JR., Personal
Representative of the Estate of FRANCES
CHIPCHASE,

Respondent-Appellee,

and

RICHARD CHIPCHASE,

Appellee.

UNPUBLISHED

December 18, 2007

No. 274599

Ingham Probate Court

LC No. 01-000237-DE

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Petitioner appeals as of right from the order denying his petition to surcharge respondent and distributing estate property. We affirm in part, reverse in part, and remand for further proceedings.

Following the decedent's death, respondent was appointed personal representative of the estate in accordance with the terms of the will. The decedent had also executed a codicil, which provided that if, after a diligent inquiry, the personal representative was unable to locate petitioner within 120 days of the appointment of a personal representative or if petitioner disclaimed his interest in the estate, his share would be divided equally among respondent and Richard Chipchase. While administering the estate, respondent mailed petitioner various estate documents and a box of personal property that came from the decedent's home. Upon administering the estate, respondent filed a closing statement, providing that the estate assets had been distributed. However, at the time of filing, respondent had not distributed to petitioner his portion of the estate and later testified that he did not do so because petitioner failed to reply to a

request to contact him. According to respondent, he was unsure whether the address that he had been mailing items to was actually petitioner's address because petitioner never responded.

Several months after the estate was closed, petitioner mailed correspondence to respondent. Thereafter, petitioner retained counsel and demanded that respondent send him his portion of the estate coupled with an amount to pay his attorney fees. Respondent offered only petitioner's portion of the estate, but the offer was conditioned on petitioner's waiver of his rights against both the estate and petitioner as its personal representative. After further correspondence was exchanged, petitioner filed to reopen the estate so he could obtain his portion of the estate property and to surcharge respondent for alleged misconduct in administering the estate. After a special master was appointed and made recommendations, the probate court ordered that petitioner receive his portion of the estate, \$43,931.79, without interest, and found that respondent did not commit any fraudulent or criminal activities while administering the estate. This appeal followed.

Petitioner argues that the probate court erred by failing to award him any interest on his one-third portion of the estate from the date respondent filed his sworn statement closing the estate up to present. We disagree. A probate court's findings of fact are viewed for clear error. *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). Findings of fact are clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* A probate court's decision whether to surcharge a fiduciary is reviewed for an abuse of discretion. *In re Duane V Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419 (2007). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Initially, petitioner's reliance on MCL 600.6013(1), which governs interest on a money judgment recovered in a civil action, is misplaced because this litigation did not involve the filing of a complaint. However, the probate court was authorized to order equitable relief under MCL 600.847. To that end, our Supreme Court has recognized that a probate court has the authority to award interest as a surcharge against a personal representative, depending on the circumstances. See *In re Tolfree Estate*, 347 Mich 272, 278, 288-289; 79 NW2d 629 (1956) (concluding that three co-executors of the estate should have been surcharged five-percent interest on money lost due to bank failure).

MCL 700.3703(1) provides, in part, that "[a] personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate." But a probate court's authority to surcharge a personal representative is limited by MCL 700.3703(2), which provides, in part, that "[a] personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time." Further, a good faith defense is available if a fiduciary has acted within the limits of his or her powers with prudence and diligence and commits mere mistakes or errors of judgment. See *In re Tolfree Estate*, *supra* at 285-286. In determining whether a fiduciary has been guilty of negligence or a violation of his or her duties, the circumstances of the particular case are controlling. See *id.* at 287-288.

Here, the probate court implicitly found that respondent's administration of the estate did not rise to the level warranting a surcharge. We agree. The record establishes that respondent put forth a good faith defense for failing to send petitioner his funds in light of the uncertainty regarding petitioner's actual address. Had petitioner timely responded to respondent's inquiries, this litigation might have been avoided. As a result, no abuse of discretion occurred concerning the amount of interest requested by petitioner. However, we do find that it was an abuse of discretion for the trial court not to award actual interest, which was \$280.30 as of June 18, 2004. Accordingly, we remand for an award of actual interest as surcharged against respondent, who had previously offered this amount to petitioner, as of the date respondent received his portion of the estate.

Petitioner next argues that the trial court abused its discretion by not surcharging respondent an amount to cover petitioner's travel costs and attorney fees associated with this litigation. Again, the probate court had the authority to award travel costs under MCL 600.847. As to attorney fees, each litigant in Michigan is responsible for his or her own attorney fees in the absence of an express statute, court rule, or judicial exception stating otherwise. *In re Freeman Estate*, 218 Mich App 151, 156-157; 553 NW2d 664 (1996). An exception at common law exists "when the party seeking attorney fees as damages has been forced to expend money to prosecute or defend a prior lawsuit because of the wrongful acts of the third party." *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995). "[T]he real thrust of the [exception] . . . is that reasonable expenses incurred in the primary litigation created by the wrongful acts of another may be recoverable but the expenses incurred in litigation with the actual wrongful party are not recoverable." *Warren v McLouth Steel Corp*, 111 Mich App 496, 509; 314 NW2d 666 (1981). This Court has also held that a probate court is authorized by its equitable powers to order equitable relief, including attorney fees, but only to avoid an inequitable result. *Kennedy v Brady*, 43 Mich App 760, 765; 204 NW2d 779 (1972).

Here, the first exception does not apply because petitioner is attempting to recover expenses against the alleged actual wrongful party. As to the second exception, no abuse of discretion occurred because petitioner could have avoided this litigation altogether had he cooperated more fully with respondent. Therefore, it was not inequitable for petitioner to pay for his expenses that arose partially because of his own actions.

Petitioner next argues that the probate court erred by failing to conclude that the decedent's personal property should have been reasonably valued at \$6,000 instead of the \$652 reported in the initial inventory. Petitioner claims that respondent converted certain items that petitioner believes were in the decedent's home. He further asserts that he should have been awarded \$2,000, a third of the reasonable estimated value of these items. He also asserts for the first time on appeal¹ that the probate court should have surcharged respondent an additional \$4,000 for sentimental items that he claims he should have received.

¹ Accordingly, relief is not available absent plain error affecting substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

We conclude that no abuse of discretion occurred concerning the alleged undervalued property because petitioner merely speculates as to what he believes was in the decedent's house at the time of her death, and offers nothing but mere conjecture on the value of these speculative items. While petitioner claims it is now impossible for him to present sufficient evidence to support his claim because the items have since been disposed of, he was aware that the estate was being administrated and could have taken actions to timely document what property was in the decedent's home. As to the sentimental items that allegedly belonged to petitioner but were never received, no plain error occurred because the doctrine of laches would have prevented petitioner from asserting such a claim below in light of his failure to timely contact respondent and inform him of the items that were important to him. See *Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997).

For the first time on appeal, petitioner argues that respondent should have been ordered to return \$1,500, the amount he charged to the estate as personal representative for services rendered. A trial court has discretion to deprive a fiduciary of compensation for administering an estate when he or she has been found guilty of fraud, willful default, gross negligence, or other misconduct in administering the estate, which, as a result, suffers a detriment. *In re Baldwin's Estate*, 311 Mich 288, 307; 18 NW2d 827 (1945). However, no plain error occurred here because, despite petitioner's characterizations, the record does not show that respondent was involved in any misconduct that resulted in the estate suffering a loss.

Finally, petitioner argues that the probate court erred by requiring each beneficiary to pay an equal portion of the special master's fee, asserting that the court should have ordered respondent to bear the entire fee. However, this issue is abandoned because petitioner fails to cite any relevant authority supporting his claim. See *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002) ("This Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal."). Moreover, as noted above, this litigation was not the sole result of respondent's conduct. Indeed, it might have been avoided altogether if petitioner had been more cooperative.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh